

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
Rules and Regulations)	CG Docket No. 05-338
Implementing the Telephone)	
Consumer Protection Act)	
of 1991)	
)	
Junk Fax Prevention Act of 2005)	
_____)	

COMMENTS OF ROBERT BIGGERSTAFF

Robert Biggerstaff (“Commenter”) hereby submits these comments as timely filed in the Commission’s NPRM (FCC 05-206), Docket 05-338.

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II. INTRODUCTION

A. The State of Junk Faxing

The scale of junk faxing in this country is staggering. Despite Commission enforcement and private actions in the courts¹, illegal junk faxers still boldly advertise their illegal schemes. A single fax broadcaster currently boasts on its web site that it can send 2 million junk faxes per day² and this is but one of many similar entities. In 2001, Fax.com boasted that it could send 3 million faxes per day³ and a list of over 30 million fax numbers. With an estimated 50 million fax machines in this country⁴ receiving a conservative estimate of two junk faxes per week,⁵ this form of petty theft has risen to 5 billion junk faxes annually in the US. This nonconsensual cost shifting now costs American businesses hundreds of millions of dollars a year in direct out-of-pocket costs and untold other expenses. Dismissing junk faxes as costing only pennies is the fallacy of “littles:”

[T]he constant recurrence of small expenses in time eats up a fortune. The expense does not take place at once, and therefore is not observed; the mind is deceived, as in the fallacy which says that ‘if each part is little, then the whole is little.’ this is true in one way, but not in another, for the whole and the all are not little, although they are made up of littles.⁶

¹ The slip reporter service TCPA Reports lists over 400 published court cases involving the TCPA. *See*, <http://www.tcpalaw.com/free/cases.htm>. This is in addition to over 150 citations and forfeitures issued by the FCC for TCPA violations.

² *See, e.g.*, <<http://www.admaxmarketing.com/faxadvertising.html>> visited Jan 6, 2006.

³ Although Fax.com no longer has its Internet web site, the contents of the site are still available via the caching services at <http://web.archive.org/web/20010508155300/http://www.fax.com/Company_profile/about.asp> visited Jan. 6, 2006.

⁴ This estimate is based on data from Gartner/Dataquest that there were 20.6 million fax machines in 1999 with a growth rate of 5.6 million per year. Andrew Johnson, *How Will Fax Fit Into the Unified Messaging Solution?*, Dataquest, Nov. 1, 1999.

⁵ This estimate is based on a nearly a decade of personal experience in TCPA related issues, interviews with fax machine owners across the country, and personal experience in varied corporate and small business environments.

⁶ Aristotle, *Politics*, Bk. 5, Ch. 8 (Jowett trans.)

A man who steals a dollar from a million people has stolen the same amount as a man who steals one million dollars from one person. In the same way, unsolicited faxing, even at pennies per page, when measured by the billions of unsolicited faxes that can be sent each year, constitutes much more than a “little.”

B. Cost of Junk Faxing

1. Cost of supplies

Industry data shows that while some advanced and expensive laser-printing fax machines can obtain the lowest cost per page, only a small minority of such fax machines are sold. The vast majority (86%) use printing technologies such as plain paper thermal-transfer recording (“TTR”), ink-jet, and thermal paper, that are much more expensive on a per-page basis.⁷

The vast majority of facsimile machines in use today use expensive thin film transfer technology, ink jet, or thermal paper. These types of fax machines made up the overwhelming majority of fax machine sales in 2000 (6 million units of 7 million units sold).⁸ “Laser” fax machines only had sales of slightly more than 1 million units in 2000, or only 14% of the market.⁹ This is a decrease from the percentage laser fax machines had in 1998, of 17%. In fact, industry data shows that fax machines using thermal transfer recording (“TTR”) which are the most expensive on a per-page basis, are in the vast majority, making up 53% of new fax machines sold.¹⁰

For example, cartridges for the popular Panasonic models of fax machine using thermal film

⁷ David Haueter, The 2000 U.S. Fax Market: Unit Shipments Up, Spending Down, Gartner Group, Inc., April 3, 2001, p. 2.

⁸ Id.

⁹ Id., p. 4.

¹⁰ Id., p. 2.

ribbons cost approximately \$30 and print 330 pages, which is over 9 cents per page, just for the film ribbon. Ink-jet cartridges generally run \$20 to \$45 each, with capacities from 600 to 800 pages each. The cost of the paper is in addition to this. As another example, one retailer includes the “cost per page” for fax machines on its website.¹¹ The first fax machine listed there is the Brother® FAX-575 Personal Plain Paper Fax/Phone/Copier, with a cost per page of \$0.135.¹²

2. *Other costs*

Prior commenters in the proceeding docket, 02-278, have enumerated many other costs in receiving junk faxes, including having to sort and dispose of them. Also included is the cost when wanted faxes are misfiled as junk, and discarded in error. It must now be realized that these costs will be increased exponentially with the new exemptions created by the JFPA, and new costs – opting out – will be imposed.

C. Cost of Compliance

When considering the various options delegated to the Commission by the JFPA, it must be remembered that the JFPA itself creates certain obligations that are not optional. All businesses that send EBR-based fax advertising must accept opt-outs requests, and must honor them. All faxes must contain the sender’s name, fax number, date and time the fax was sent. The costs for these two items is not discretionary... if a business chooses to send EBR-based faxes it must comply with these requirements. In addition, it is implicit that all businesses that send EBR-based faxes must have a list of the fax numbers of their customers in order to even send the faxes. As a result, when considering costs of compliance, the Commission should only consider differential costs above these

¹¹ *See* <<http://www.OfficeDepot.com>> visited Jan. 9, 2006.

¹² <<http://www.officedepot.com/ddSKU.do?level=SK&id=768320&&An=text>> visited Jan. 6, 2006.

non-discretionary costs.

III. DISCUSSION

A. The “Fax First, Look for EBR Later If Caught” Business Plan.

1. *How an Established Business Relationship exemption is misused*

There is an unfortunate misunderstanding of how an Established Business Relationship (“EBR”) exemption is illegitimately exploited by junk faxes. The vast majority of businesses do not send such faxes recognizing that such faxes are unwanted and will do more harm than good to a legitimate business relationship.¹³ Unfortunately, fax advertising is like sending spam e-mail – it has become so cheap to advertisers that it is now economically attractive to indiscriminately blast faxes to large lists of fax numbers, knowingly offending 99.9% of recipients in order to find the 0.1% that are receptive to their offer. Such a practice is generally not implemented by legitimate businesses attempting to reach existing customers, but most often is used by scofflaws such as “pump and dump” stock touters and bogus travel package resellers. However, the vast majority of illegitimate faxers *claim* the protection of an alleged EBR with the victim.¹⁴ When considering the impact of any EBR exemption on consumers, the Commission must consider all instances where a faxer *claims* an EBR (which is most junk faxes) and not just the cases where a fax was a legitimate EBR fax (very few faxes). The mere fact an EBR exemption exists means it is roundly abused. Congress expressly stated that not just the effects of EBR faxes should be considered by the Commission, but the effects of the mere *existence* of the EBR exemption must be taken into account.¹⁵

¹³ Indeed, small businesses are the most vocal opponents of junk faxes since they are most attentive to waste and misuses of their limited resources, and the personal outrage is greatest when the owner is directly involved, such as in a small business and particularly in a sole proprietorship.

¹⁴ This finding is soundly based in my personal experience in TCPA litigation across the country for nearly a decade.

¹⁵ In determining the time limits on a faxing EBR, “the Commission shall— (I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone

The illegitimate businesses, such as fly-by-night junk fax broadcasters, regularly try to exculpate themselves from TCPA violations *after* the illegal fax was sent by attempting to discover and claim an EBR only if a complaint is made. This illegitimate EBR claim is the standard business plan of junk faxers. This must be taken into account when the Commission reviews the record.

2. *Examples*

For a real-world example of this tactic, I received a junk fax from a hotel soliciting me to stay at the hotel on New Year's Eve. After bringing a claim under the TCPA, the hotel then demanded bank statements, credit card receipts, and other documents attempting to "discover" if I had been a customer of any other hotel in the past. They demanded to know where I had gone on my vacations and where I stayed. All of this was an attempt to "discover" if I had done business with one of their affiliates in the past, so they could claim the fax was sent within an EBR with the hotel. A year later, more junk faxes from yet another hotel came, and the same tactics were employed to try to "discover" an EBR with me, after the fax was already sent.

In truth, I was never a customer of either hotel, and neither hotel was sending the faxes to existing customers or anyone else on the basis of an EBR. They both had purchased lists of anonymous fax numbers and sent the faxes indiscriminately. Thus any claim that the faxes were sent based on an EBR was not a legitimate claim.

This opprobrious tactic of "fax first, look for EBR later if caught" is a standard business practice for junk faxers. For example, a local computer store sent me multiple junk faxes and then even denied sending them. When presented with telephone records proving the faxes were sent, the

facsimile machines;" JFPA, section 2(f).

store owner then claimed that because I was employed in the “computer industry”¹⁶ that I “must “ have at least called their store in the past at some time to inquire about their products, and thus they had an EBR with me that permitted the faxes at issue. A Wal*Mart store in my state tried the same excuse for its junk faxes, arguing that most people at some time enter a Wal*Mart store so the faxes were received by people who likely had an EBR with Wal*Mart, despite the fact that the faxes were broadcast to an anonymous list of fax numbers obtained from a third party and Wal*Mart had no knowledge of who the recipients were. Some junk faxers have even demanded in court to examine a victim’s computer hard drive claiming that the victim “might” have at some time in the past visited the company’s website and “might” have created an EBR.

3. The legal standard for this situation.

It is well settled in the law that after a violation of a person’s statutory rights has occurred, you can not use later discovered evidence to escape liability. For example in McKennon v. Nashville Banner Publishing Co.,¹⁷ the Court faced a situation where an employer fired a woman based on her age. That firing based on age violated the Age Discrimination in Employment Act of 1967 (“ADEA”). After suit was filed, the employee admitted that she had copied several of the company’s confidential documents during her final year of employment, and this subjected her to termination for cause. The company argued that because she *could* have been fired for cause, her firing was not in violation of the ADEA.

The court ruled unanimously against the company, holding that as a matter of law, after-the-fact discovered evidence can not be used to justify the act of firing already taken place. The Court

¹⁶ My position was with a large Fortune 500 business and Sr. Support Systems Engineer, with job duties generally described as responsible for the multisite corporate computer networks and users’ workstations.

¹⁷ McKennon v. Nashville Banner Publishing Co., 513 US 352 (1995).

noted that “deterrence is one object of these statutes” and when someone seek redress for his injuries, he “vindicates both the deterrence and the compensation objectives of the [statute].” The court explained:

The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the Act’s operation or entrenched resistance to its commands, either of which can be of industry wide significance. The efficacy of its enforcement mechanisms becomes one measure of the success of the Act.

A junk faxer who uses a third-party list to indiscriminately blast junk faxes is flouting the law and is *exactly* what the TCPA was enacted to stop, just like the ADA was enacted to stop improper age discrimination. The indiscriminate junk faxer has no legitimate claim to the limited EBR-based fax exemption in the JFPA. It is inconsistent with the statute’s purpose to permit a scofflaw to use after-acquired evidence to escape responsibility for indiscriminate junk faxing.

4. The exception created by the JFPA will be subject to misuse without clear Commission guidelines.

The JFPA recognized a limited exception to the general prohibition on junk faxes, based on the principal of those faxes being sent to communicate with existing customers. Unfortunately, illegitimate fax blasters have demonstrated that they intend to claim an EBR exemption as *carte blanche* to conduct massive and indiscriminate blast faxing to anonymous lists of fax numbers with a “fax first, find EBR later if caught” business plan. Unless the Commission adopts guidelines to limit this misuse, legitimate EBR faxes will all be lumped together with illegitimate ones in consumer outrage. The purpose of the TCPA is, after all, to preserve the fax lines and the recipient’s

resources for wanted communications, and prevent illegitimate cost shifting.¹⁸

5. *Fax advertisers must know an EBR exists with the recipient when they send EBR-based faxes*

The common sense approach is to make clear that in order to avail itself of the EBR exception, the *advertiser* must demonstrate that it qualified for that exception when the fax was sent. Where a junk faxer uses a third-party list of fax numbers without regard to whether or not it has an EBR with the recipients at those fax numbers, any claim that an EBR permitted the faxes is simply not legitimate. This is distinguished from the situation where an advertiser is aware of its EBRs with a list of existing customers, and uses a third party list to determine the fax numbers of its recent customers.¹⁹ This latter activity is contemplated by the JFPA and potentially lies within the exception the JFPA creates.

The Commission should implement a rule so that the EBR exemption is limited to the situation where an advertiser sent the fax based on an EBR, meaning he based the decision to send the fax on affirmative knowledge when the fax was sent that an EBR existed with the recipient. In other words, the fax must be based on an EBR and not randomly sent.²⁰

Interpreting the TCPA so that an advertiser is prohibited from sending junk faxes unless he is sending them on affirmative knowledge of an EBR at the time the fax is sent is reinforced by the fact that the TCPA is a remedial consumer protection statute and “should be liberally construed and

¹⁸ *See, e.g., Holcomb v. SullivanHayes Brokerage Corp.*, 2002 TCPA Rep. 1078 (Colo. Dist. Feb. 25, 2002) *cert. denied*, slip. op. (Colo. Oct. 7, /2002).

¹⁹ This is know as “reverse append” in the list industry, where a company with an existing database of its customers uses a third-party list to supply missing or more current data about its customers, such as new addresses for customers who have moved.

²⁰ The appropriateness of this “based on” language is also reflected in how the JFPA itself denotes these faxes, such as in section 2(a) (“...unsolicited advertisement that is sent *based on* an established business relationship with the recipient...”). *See, also*, NPRM at ¶¶ 11 and 16.

interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.” Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253, 258 (4th Cir. 1950). Exemptions from provisions of remedial federal statutes “are to be construed narrowly to limit exemption eligibility.” Hogar v. Suarez-Medina, 36 F3d 177, 182 (1st Cir 1994); See, also, 3 N. Singer, Sutherland Statutory Construction § 60.01. These well established principals shoul guide the Cmmission.

It must be remembered that the *only* people who would be impacted by this common sense rule would be advertisers who send indiscriminate blasts of faxes to fax numbers they have no known EBR with. Anyone who sends a legitimate fax intended for an existing customer know it, and can easily prove it.

6. *The advertiser bears the burden of proof that it is entitled to an EBR exemption created by the JFPA.*

The legal basis for requiring the advertiser to bear the burden of proving it is entitled to the EBR exception to the TCPA created by the JFPA is well settled. It is black letter law that:

[T]he general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.²¹

This truism has been applied by the courts in over a dozen TCPA cases, recognizing that the

²¹ FTC v. Morton Salt Co., 334 U.S. 37, 44-45 (1948). See also Rheem Mfg. Co. v. Rheem, 295 F.2d 473, 475 (9th Cir. 1961) (“the proponent has the burden of proving every fact essential to the invocation of the exemption”) citing Schlemmer v. Buffalo, Rochester & Pitts. Ry., 205 U.S. 1, 10 (1906); Walling v. Ried, 139 F.2d 323 (8th Cir. 1943); 2A Sutherland on Statutory Construction 47.11, p. 90 (4th ed. 1973); 82 C.J.S. Statutes § 382, pp. 889-93 (1953). See generally Wright and Miller, Federal Practice and Procedure Civil 2d § 1271 at 439, n.40 (exemption from statutory coverage constitutes an affirmative defense). Burden of proof is a substantive element of any claim so state courts adjudicating a federal claim such as the TCPA must apply federal jurisprudence in this area. See, e.g., Central Vt. R. Co. v. White, 238 U.S. 507, 510-11 (1915) (When a state court hears federal cases, the burden of proof in contributory negligence is on the defendant, even if state practice is different, since that is the federal rule.)

advertiser bears the burden of proof that it is eligible for any exception or exemption in the TCPA.²²

“Therefore under the TCPA, a defendant bears the burden to plead and prove the facts necessary to claim an exemption (if it exists) such as an ‘established business relationship’ or ‘express invitation or permission.’”²³ Congress fully expected the advertiser to have this burden:

However, enterprises relying on the exception should establish specific procedures for obtaining prior permission and maintaining appropriate documentation with respect to such permission.²⁴

See also S. Rep. 102-178, 1991 U.S.C.C.A.N. 1968, at 1975-76 (“[T]elemarketers will be responsible for determining whether a potential recipient of an advertisement, in fact, has invited or given permission to receive such fax messages, such a responsibility, is the minimum necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner’s uses of his or her fax machine.”) This is of course only logical – otherwise a the fax machine owner would have to “prove a negative” which is unrealistic.

A nearly identical question was raised in United States v. First City Nat. Bank, 386 U.S. 361, 366 (1967):

First is the question whether the burden of proof is on the defendant banks to establish that an anticompetitive merger is within the exception of 12 U.S.C. 1828 (c) (5) (B) or whether it is on the Government. We think it plain that the banks carry the burden. That is the general rule where one claims the benefits of an exception to

²² See, e.g., Jemiola v. XYZ Corp., 802 N.E.2d 745, 126 Ohio Misc.2d 68, 2003 TCPA Rep 1252 (Ohio C.P. 2003); Giovanniello v. Hispanic Media Group United States, 780 N.Y.S.2d 720, 2004 TCPA Rep. 1308, 4 Misc.3d 440 (N.Y. Sup. 2004); Covington & Burling v. Int’l Mktg. & Research, Inc., 2003 TCPA Rep. 1164, 2003 WL 21384825 (D.C. Super. Apr. 16, 2003); Clark v. Red Rose, Inc., 2004 TCPA Rep. 1300, 2004 WL 1146679 (Oh. Mun. May 3, 2004); Coontz v. Nextel Comm., Inc., 2003 TCPA Rep. 1237 (Tex. Dist. Oct. 10, 2003); Vertex Chem. Corp. v. Asphalt Paving Equip., LLC, 2004 TCPA Rep. 1263 (Mo. Cir. Feb. 17, 2004); Altman v. Inside Edge, Inc., 2004 TCPA Rep. 1291 (Mo. Cir. Aug. 2, 2004); Clean Carton Co. v. Prime TV, LLC, 2004 TCPA Rep. 1294 (Mo. Cir. July 13, 2004); Ambrose v. Expiry Corp., 2004 TCPA Rep. 1325, 2004 WL 2434390 (Ohio C.P. Oct. 7, 2004); Travel Travel Kirkwood, Inc. v. Jen N.Y. Inc., dba Discount Tickets, 2005 TCPA Rep 1410 (Mo. Cir. Nov. 4, 2005).

²³ Vertex Chem. Corp. v. Asphalt Paving Equip., LLC, 2004 TCPA Rep. 1263 (Mo. Cir. Feb. 17, 2004).

²⁴ H. R. Rep. No. 102-317 at 13 (1991)

the prohibition of a statute.²⁵

First City National Bank is very instructive on this issue. Not only does it involve a statutory exemption in a consumer protection statute similar to the TCPA, but the Court also reviewed legislative history to reveal Congressional intent with respect to who bears the burden of proving the statutory exemption.²⁶ As discussed *supra*, similar review of the legislative history of the TCPA reveals that Congress expressed a clear intent that advertisers bear the burden. Congress legislates with full knowledge of how the courts interpret statutes²⁷ so here Congress clearly knew the burden would be placed on the advertiser.

B. What constitutes “voluntary” and “public” release of fax numbers for use by EBR-based advertisers?

1. *A Hobson’s choice for fax machine owners.*

Many fax machine owners face a Hobson’s choice with regard to making their fax number widely known. For example, the circuit administrator for the Eleventh Circuit asked that the court’s fax number be stricken from directories out of fear that fax advertisement would interfere with death penalty appeals.²⁸ Others limit distribution to internal company lists and trusted affiliates. Prior commentators in this docket have described company facilities and government installations with hundreds of fax machines regularly abused by junk faxers. Unfortunately many unscrupulous list brokers “mine” for these numbers, combining together lists of numbers from multiple sources

²⁵ *Id.*

²⁶ *First City Nat. Bank*, 386 U.S. at 366

²⁷ *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (“It is presumable that Congress legislates with knowledge of our basic rules of statutory construction.”); *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 220 n.9 (1991) (“We will presume congressional understanding of such interpretive principles.”)

²⁸ *National Law Journal*, Mar. 6, 1989, at 1.

(including “war dialed” numbers) and then resell those lists in directories. This has been going on since the early days of junk faxing, with some list brokers even bribing company employees into providing internal company fax number lists.²⁹ Today, many junk faxers get their lists from list brokers such as InfoUSA. In some cases, list brokers distribute lists of fax numbers that have never been publically disclosed but were instead “discovered” by “war dialing” in violation of the Commission’s rules.³⁰

2. Mandatory or practically mandatory releases of fax numbers are not “voluntary”

Many fax machine owners have no choice but to distribute their fax numbers in a variety of publically accessible lists. For example, every person with an Internet domain has to provide registration information, including phone and fax numbers, to their registrar, which under ICANN regulations is then publically accessible to any person on the Internet. Chemical companies must make Material Safety Data Sheets (“MSDS”) available to the public. These often contain fax numbers to facilitate rapid access to important information in case of emergency or accident. Public safety and rapid access to this information could be impacted if companies were inclined to stop listing fax numbers on an MSDS out of fear of those numbers being used for advertising. Attorneys are required in many places to place fax numbers on pleadings. The list of similar places where fax numbers are required is boundless.³¹

²⁹ “For example, firms like ‘Mr. Fax’ are developing databases of facsimile telephone numbers by offering bounties to persons who report such numbers.” *Telemarketing Practices: Hearings on H.R. 628, 2131, and 2184 Before the Subcomm. On Telecommunications and Finance of the House Comm. On Energy and Commerce*, 101st Cong. 1st Sess. at 86 (1989).

³⁰ 47 C.F.R. § 64.1200(a)(7).

³¹ For example, a Google search for the phrase “fax number is required” returned 213,000 hits, many from web site registration forms. Unless the Commission adopts common sense restrictions on the source for fax number lists, a fax machine owner wishing to protect his fax machine from unwanted faxes would face the choice of being shut out of thousands of web sites or take the risk that one of those sites he gives his fax number to would use it to populate a list provided to fax advertisers.

3. An Example

As an illustration, several sources list hundreds of fax numbers on Capital Hill discovered through “public” sources,³² including a list of fax numbers at the Commission’s office in Washington and its field offices around the country. Without some common sense guidelines from the Commission, an office vendor who sells one ream of paper to a Commission field office in Texas could then blanket every Commission fax machine nationwide with faxes.... completely legally.

This scenario is not so far fetched as it sounds. Blast faxing is very lucrative.³³ One broadcaster even admitted to me that “we know it is illegal, but it is too lucrative to stop” and went on to describe how his company made \$6 million a year with junk faxes. Being able to legally send even a few thousand “pump and dump” stock touts is a gold mine. A business could send free samples of some item to a list of companies with a survey form to return. For each survey form returned, they could then claim an EBR and legally blanket the thousands of fax machines in each company with junk faxes to every fax number of that company it could find in a “publically available” list.

4. Release of fax numbers for limited purposes is not a release to the “public.”

Another frequent use of fax numbers that is abused by junk faxers is when a fax number is distributed for a limited and specific use, such as when a help wanted ad is placed in the newspaper with a request to “fax resumes to 555-1212” or a college posts requests on bulletin boards around

³² While these list brokers may claim the numbers were obtained from public sources, it is quite possible that the “public” sources they obtained them from were compilations of numbers obtained from *non-public* sources, or war dialing. For example, someone could war dial all the numbers in the DC area, and then post the list of “discovered” fax numbers found to the Internet, and thus make them “publically” available. This type of “washing” of illegally obtained fax numbers is currently permitted under the existing Commission rules.

³³ In 2001, one large fax broadcaster stated that “fax broadcasting business generating over \$250 million in annual revenue.” http://www.fax.com/Company_profile/our_business.asp.

campus to fax class registration forms to the registration office. When a fax number is displayed for a limited purpose, it is limited to specific people (in this case job applicants or students of the college) and not the “public” so that number should not be free for use by EBR-based fax advertisers.

5. A Logical Solution

The most logical solution is to permit EBR-based fax advertisers to use fax numbers from a directory, web site, advertisement, or other source, only 1) when the fax numbers in that list were obtained *directly* from the holders of those numbers and 2) the holders were advised that they were providing them to a publication that would be made available to EBR-based fax advertisers.

The first clause is to prevent “re-aggregation” and republishing of lists that were intended for a limited distribution or which were obtained improperly. If a fax machine owner releases his fax number to one small industry directory of limited distribution, that number should not be copied and added to other lists and redistributed in another directory. This provision is an absolute necessity. Without it, even fax numbers that were found through illegal war dialing will be sold and resold to “launder” them so their original source is obscured. With this clause, the “voluntary” release of the fax number to directory “A” can not be construed as the “voluntary” release to directory “B” which is just taking the contents of list “A” and combining it with other lists to make a new directory.

This provision is also reasonable in light of the JFPA’s provision that the release by the fax number holder must be to the “public.” Many directories are closed publications, and have a limited circulation - such as a company’s internal fax list. Similarly, membership directories are generally only distributed to members with distribution to non-members limited. Industry directories are similarly limited. Directories that impose a fee to use or purchase are similarly limited in distribution, and such is not a distribution to the “public” but only to the subscribers and purchasers of those directories. If the fax number holder is not informed the directory is wholly “public” then

that directory can not be construed to satisfy the language of the JFPA.

The second clause ensures that the release of the fax number was indeed voluntarily made in the context of its future use for faxing within an EBR. For example, many web-sites request fax numbers and other personal information and the expectation by users is that those fax numbers will not be further redistributed. Requiring proper notice when those numbers are collected would ensure that the expectations of consumers are protected. Again, if the fax number holder is not informed their fax number will be released in a directory that is provided free to the general public at large, the release by the holder to the directory can not be construed to satisfy the language of the JFPA.

If these two conditions are not met, then a fax number would not be considered “voluntarily” released to the “public” so use by fax advertisers seeking to send EBR-exempted faxes would not be allowed. This would also allow companies with multiple fax machines, to obtain the benefits of distributing their fax numbers to *customers* (such as direct dial fax machines to reach individuals) using limited distribution lists, allowing release of a single fax number for advertisements in a bona fide public directory (such as the number of a central purchasing office fax machine) while preventing misuse of other fax numbers by unwanted junk fax advertisements.

Under this solution, liability for violations would remain with the party on whose behalf the advertisements were sent, and list providers would then indemnify fax senders who use such lists in the event a fax transmission violates the TCPA. This would incentivize fax advertisers to use reputable list sources, and discourage the use of “fly-by-night” list brokers who would be tempted to falsify such certifications.

6. *Self-published sources*

For self-published items such as Internet web sites and newsletters, fax machine owners need to be able to protect themselves from unwanted faxes, while at the same time be able to safely

provide their fax numbers for legitimate purposes. The Commission should develop language that can be used in such instances so a business can publically display its fax number and the fax numbers of others while prohibiting use of those numbers for sending fax advertisements. For example a simple statement that “fax numbers contained in this publication or website are not published for use in sending advertising materials” would allow newsletters, web sites, and other publications to protect the fax numbers they contain. The Commission should adopt a rule giving operative force to such a statement.

Finally, the Commission must recognize that its own rules require the sender’s fax number to be placed on all faxes sent. Since this is a requirement in law, the display of a fax number on the cover page or the header of a fax can not be construed as “voluntarily” given to the recipient for use in sending fax ads or use in compiling fax number lists.

C. What time frame is reasonable for complying with a “do-not-fax” request made to an EBR-based faxer?

The Commission has asked for empirical evidence on what length of time is appropriate for complying with a do-not-fax (“DNF”) request and if the time period should differ from the period of time to comply with a do-not-call (“DNC”) request under the Commission’s telemarketing rules. It has been suggested that the 30-day rule provides a reasonable outside limit to compliance, but this leaves open what is “reasonable” when a shorter time is achievable.

The answer to what is a “reasonable” period of time is intrinsic to the advertiser itself: subject to the 30-day outside limit, an advertiser should comply with a DNF request in the same time period in which it sends a subsequent fax to the same number.

For example, if an advertiser needs a full 30 days to comply with a DNF request, then that advertiser should not send more than one advertising fax to any fax number in any 30-day period.

If a fax advertiser wants to send faxes more frequently, then it must implement a system to comply with a DNF request more quickly. This common sense solution ensures that an objecting recipient will receive no more faxes from a compliant fax advertiser. It also incentivizes fax advertisers who want to advertise more frequently to implement faster compliance methods.³⁴

If this simple methodology was implemented, the 30-day outside limit would be reasonable since everyone who exercised the opt-out notice on an EBR fax would be assured of not receiving another unsolicited EBR fax from that sender. If this simple methodology was not adopted, the cost burden on recipients of junk faxes make a 30-day window unacceptably long, and the Commission should adopt a much stricter time frame.

In the context of telemarketing calls, I have seen evidence that some telemarketers intentionally target consumers who have made a recent do-not-call request with more frequent telemarketing calls during the “grace period” between the consumer’s DNC request and the date the telemarketer complies with this request. In some cases, when informing the telemarketer that I had recently made a do-not-call request to their company, the telemarketer responded that they could tell from their computer screen that I had made a recent DNC request, but they insisted could call me for 30 days after that request before they had to stop. Reports from others shows that this tactic is widespread, and the frequency of calls from a particular telemarketer often increases during the 30 days after a DNC request to that telemarketer. It is reasonable to anticipate that junk faxers will employ similar tactics when presented with a DNF request.

D. Adopt a reasonable time frame on fax EBR as for telemarketing calls EBR.

The Commission seeks empirical evidence supporting a departure from the bifurcated

³⁴ While the regulations regarding compliance with a telemarketing DNC request are not subject to this NPRM, this same solution should be applied in that context at the earliest opportunity.

18/3-month time frame on the EBR as applied to telephone solicitations. First, the existence of the black and white 18/3-month time frame with respect to telemarketing calls has had many salutary benefits to both consumers and marketers because such a “bright-line” test removes ambiguity. It has avoided a great deal of litigation and uncertainty for everyone.³⁵ This amply demonstrates that a similar “bright-line” test for an EBR with regard to faxes is necessary and desirable.³⁶ Telemarketers have already been complying with the 18/3-month time frame for over two years.

However the nature of fax advertising as a cost-shifted mechanism of advertising, or “advertising by theft” make clear that fax advertising presents many problems not presented by mere telemarketing calls. Congress and the Commission both recognized that intrusive methods of automated communications which impose a cost on the recipient should be subject to the most restrictive guidelines.³⁷ This militates strongly in favor of a more restricted time frame for a faxing EBR than for a telemarketing EBR.

Considering this evidence, a reasonable time frame for junk faxes based on an EBR should be significantly shorter than that for telemarketing calls. This would be 15 days following an inquiry, and 90 days following a purchase.

It would also be advantageous to limit the number of faxes in that time frame. Because an EBR based on a mere “inquiry” is so tenuous and easily formed, no more than one fax should be sent in response to an inquiry-based EBR (which likely would be the response asked for in that inquiry,

³⁵ This is even more important since the TCPA is generally interpreted by local small claims courts who which “are poor forums for producing uniform interpretations of federal law.” *Application of the Telephone Consumer Protection Act To Intrastate Telemarketing Calls and Faxes*, 52 Fed. Comm. L.J. 667 at 669 (2000);

³⁶ It is also a misstatement to claim that an EBR was ever of an unlimited duration. The time frame has always been subject to a “reasonableness” test. *See, e.g.*, H. R. Rep. No. 102-317 at 14 (1991).

³⁷ For example, the provisions of the TCPA that prohibits all calls, whether they are ads or not, made by autodialer to cell phones, pagers, or other devices where the recipient is charged to receive the call.

or a request for express permission to send additional faxes). It must be remembered that these advertisers are costing the recipient money to pay to receive these ads, and these advertisers can, in the first contact after an EBR was formed, ask permission to send future ads.

E. Adopt a policy that DNF request trumps an EBR and remains in force even if the consumer continues to do business with the advertiser.

The Commission recognized that in the telemarketing context, a DNC request trumps an EBR even if the consumer continues to do business with that advertiser.³⁸ There is nothing to distinguish the analogous application of the same principle to a DNF request.

F. An advertiser must comply with all DNF requests.

In the context of telemarketing calls, the Commission has not limited the methods by which a consumer can communicate a DNC request to a marketer. Similarly, the Commission concluded that in the context of telemarketing calls, DNC requests made to an advertiser's agents must be complied with by the advertiser. There is nothing to distinguish the analogous application of the same principle to a DNF request made to a fax advertiser's agent.

Many consumers prophylactically give such notices to the companies they do business with. It would be inconsistent to prescribe only fixed and limited methods by which a fax advertiser must accept a DNF request when there are no such restrictions in the telemarketing context. It would be odd indeed, if by calling a local hardware store and asking the price of a hammer, the hardware store could then blanket me with junk faxes, but in the same telephone call I could not also tell them not to send me those faxes. It would create a situation whereby the hapless consumer is required to first suffer and pay for the junk faxes before being legally allowed to tell the sender not to send them.

³⁸ NPRM at note 60, citing 47 C.F.R. § 64.1200(f)(3)(i).

1. *Allow oral DNF notice so it can be made at the same time an inquiry or purchase is made.*

The solution is to require either that a fax advertiser accept any DNF request it receives, or at the very least, it must accept them in the same manner by which it purports to create an EBR. If I can form an EBR by calling their office, then they must accept my DNF request by calling their office.

With regard to express invitation or permission to send fax advertisements given after a prior DNF request, adopting reasonable construction of “express invitation or permission” (discussed *infra*) along with the burden of proof on the advertiser to demonstrate such consent was obtained (discussed *supra*) resolve this issue.

2. *Allow fax machine owners to list blocks of numbers on opt-out requests.*

Often a business will have entire telephone exchanges or large blocks of numbers. Knowing the types of evasions implemented by the junk fax industry, a junk faxer may not accept an opt-out request listing “all numbers in the (999)-555-xxxx exchange” of “all numbers from (999) 555-2000 to (999) 555-3000” because it does not list each *individual* fax number of the company in that exchange. The Commission should make clear that opt-out requests of this form must be accepted.

G. *Do not allow EBR sharing or faxing “on behalf of” another using your own EBR.*

Congress created the original EBR for telemarketing calls, noting that calls from a company you were already doing business with were not as unexpected as “cold-calls.” In doing so, it noted that the propriety of the EBR-based call would rest of the expectation of the consumer receiving the call, based on the identity of the caller. This is an important element of any EBR-based solicitation be it fax or otherwise. If I do business with Joe’s Hardware, a subsequent solicitation from Bill’s Carwash is totally unexpected, even though Joe’s Hardware may be affiliated with Bill’s Carwash.

As Congress noted:

[A business] relationship established through the purchase of a piece of merchandise from a company's retail or catalogue division does ***not*** necessarily mean that a business relationship has been established between the customer and the company's other unaffiliated divisions or subsidiaries, or divisions that *a customer would not associate with the initial contract or purchase*. . . . [I]t would be inappropriate for an affiliate company to rely on the established business relationship exception to solicit a subscriber with respect to products or services *not substantially related to those upon which its affiliate's business relationship was based*.³⁹

With respect to fax advertisements, a disturbing practice has emerged whereby someone with a legitimate EBR will use this EBR to send faxes for someone else. For example, in Georgia, the state Trial Lawyers Association has advertised to local businesses that it will send the businesses' junk faxes to members, using the association's list of members' fax numbers, and rely on the EBR between the members and the TLA to permit those faxes. Obviously, an attorney who may expect a fax from the bar association, does not expect that a fax from a car wash or bowling alley to be sent to him based on an EBR between the attorney and his bar association.⁴⁰

Consistent with the legislative history, the Commission should make clear that an EBR-based fax is only within the JFPA's exception if the products or services advertised are substantially related to those upon which the business relationship was based and the EBR-based fax is by or on behalf of an advertiser which the recipient would expect or associate with the EBR on which the fax was based. "[T]he test to be applied must be grounded in the consumer's expectation of receiving the call. . . . The Committee intends this *test to be one of substance and not one of form*."⁴¹

³⁹ H. R. Rep. No. 102-317 at 15 (1991) (emphasis added).

⁴⁰ The requirement, discussed *supra*, to identify the business with which the EBR was formed on EBR-based faxes would also expose faxes sent utilizing this tactic.

⁴¹ H. R. Rep. No. 102-317 at 15 (1991) (emphasis added).

H. Do not allow an EBR to be formed through ruse of by initiation of the advertiser.

Because the JFPA provides for an EBR to be formed between businesses, it is possible for a fax advertiser to claim to obtain an EBR with many businesses by way of a ruse that is not available in a call to an individual. A junk faxer can simply call up a business and ask the price of an item or the business' hours, and when the business replies, the junk faxer can claim that a "voluntary two-way exchange" has taken place and an EBR was created. To prevent this ruse, the Commission should adopt a rule that an EBR can not be formed by the unilateral initiation of contact with the recipient by or on behalf of the advertiser. This is consistent with the treatment of the courts:

If a 'business relationship' could be established solely by a telephone call from a business to a consumer, then practically any business could easily create an established business relationship with practically everyone, by simply making cold-calls. Such a construction is inconsistent with the remedial nature of the statute. The Court is of the opinion that it takes more than these phone calls to create an "established business relationship" under the TCPA.⁴²

I. Adopt regulation requiring DNF compliance policy, available upon demand.

In the context of telemarketing calls, the Commission required businesses engaged in telemarketing to have a written policy, available upon demand, outlining their policies for compliance with the Commission's telemarketing rules. There is nothing to distinguish the analogous application of the same principle to the Commission's fax rules.

J. Require Opt-Out notice for all EBR faxes and do not exempt tax-exempt nonprofits from opt-out notices.

There is no justification in exempting any entities who send EBR-based faxes from the requirement to include the opt-out notice on their EBR-based faxes. All entities sending any faxes

⁴² *Schumacher Fin. Svcs., Inc. v. Metropark Comm.*, 2003 TCPA Rep. 1093 (Mo. Cir. Feb. 14, 2003).

are already under obligation by the TCPA to include their name, fax number, date, and time the fax was sent.⁴³ Requiring the opt-out notice on EBR-based faxes is a minor task for the sender, but protects the rights of the recipient. It must be remembered, most companies do not send junk faxes, and it is only those that voluntarily chose to do so that will be required to include the opt-out notice.

K. Require cost free opt-out mechanism and do not exempt tax-exempt nonprofits or small businesses from this requirement.

There is similarly no justification in exempting any entities who send EBR-based faxes from the requirement to have a cost-free method to stop EBR-based faxes. It must be remembered, that some of the most reprehensible junk faxers, such as Fax.com, fall in the category of “small businesses” under federal standards.

There can be no significant cost in implementing such a mechanism. All senders must comply with an opt-out request, so that cost of compliance with the actual DNF requests is not germane to this question. Only the cost to the sender of the use of the “cost-free” mechanism is relevant. For example, if a company used an 800 number to comply with the “cost-free” opt-out provision, there would only be a “cost” to the sender when this 800 number is actually used. If, as so many junk faxers claim, everyone likes their junk faxes, no one will want to opt-out so there will be no calls using the 800 number. If an advertiser is sending out junk that is enraging the recipients, then the resulting volume of calls to his 800 opt-out number, it is truly a direct result of his own doing.

L. All types of cost-free mechanisms are not the same.

While it may seem reasonable to permit any cost-free mechanism, some can have unintended consequences. An opt-out request done by e-mail reveals the sender’s e-mail address to the

⁴³ 47 C.F.R. 68.318(d).

advertiser, and could be deemed to be the form of communication that would allow spam e-mail to be sent under the CAN-SPAM Act, or the sender's e-mail address could then be resold by the advertiser. A web-site based opt-out can also be misused in a similar fashion. A call to an 800 number can reveal the caller's telephone number. When specifying any specific cost-free mechanisms, the Commission should adopt a rule that any information obtained pertaining to an opt-out request can not be used for any other purpose than for honoring the opt-out request and that making an opt-out request can not be used as the basis for an EBR.

M. Require faxes sent based on an EBR to state that they are sent based on an EBR.

As discussed supra, many fax advertisers have in the past sought to exploit EBR-based faxing by claim an EBR with the recipient when in fact none existed. As part of the EBR-based fax opt-out notice and identity of the sender, the Commission should require that the identity of the entity whose EBR is being relied on should be required to be stated on the fax as part of the opt-out notice. If this is not required, advertisers relying on an affiliated entity's EBR, can use anonymous 800 "opt-out" services and the recipient never knows what company is sharing an EBR, and he has no way to identify and contact that company to express is displeasure at this method of advertising. This requirement would place little to no burden on legitimate fax advertisers sending faxes to their customers or members who will have no problem identifying themselves to the recipient, but will go far in assisting consumers in identifying illegitimate claims of bogus EBR's.

N. Prohibit sharing of fax numbers provided in a DNF request

In the context of telemarketing calls, the Commission forbids sharing of telephone numbers except to facilitate a DNC request. There is nothing to distinguish the analogous application of the same principle to a DNF request.

O. Require fax advertiser to, upon request, identify the source of a fax number and state the basis for the fax (permission or EBR or other exemption), and that such a call to request that information does not create an EBR.

While the Commission made “war dialing” for fax numbers illegal in 2003⁴⁴ many entities are still engaging in this practice, and still others are using and selling lists of fax numbers obtained by this illegal tactic.

One of the common complaints of consumers receiving telemarketing calls and junk faxes, is “how did they get my number?” If you know the source that is releasing your phone or fax number, you can take action to stop future release.

P. While an EBR may exist between an organization and a member, there is no EBR between members.

In several instances, junk faxers have claimed that they have an EBR with the recipient because both the advertiser and the recipient are members of some common organization. Obviously an EBR can not be formed in this way. If it could, a junk faxer need only join a few large membership organizations and they will be able to send junk faxes to millions of fax machines.⁴⁵ The courts have uniformly rejected the contention that membership in a common organization permits the sending of unsolicited faxes.⁴⁶ In its commentary, the Commission should make clear that an EBR does not exist merely because two entities are both members of a common

⁴⁴ 47 C.F.R. § 64.1200(a)(7).

⁴⁵ Such as the Chamber of Commerce which, according to its website, includes over 3 million members. <<http://www.uschamber.com/about/default>> visited Jan 9, 2006. Assuming that many members of the Chamber are businesses with multiple fax machines, a junk faxer could immediately have legal access to several million fax machines by joining the Chamber.

⁴⁶ *See, e.g., Schumacher Fin. Svcs., Inc. v. Metropark Comm.*, 2003 TCPA Rep. 1093 (Mo. Cir., Div 39, Feb. 14, 2003); *Travel Travel Kirkwood, Inc. v. Jen N.Y. Inc., dba Discount Tickets*, 2005 TCPA Rep 1410 (Mo. Cir. Nov. 4, 2005); *Biggerstaff v. Low Country Drug Screening*, No. 99-SC-86-5519 (Magis. Ct. S.C. Nov. 29, 1999); *Biggerstaff v. Computer Products*, 1999 TCPA Rep. 1123 (S.C. Magis. Sep. 29, 1999).

organization.⁴⁷

Q. Adopt guidelines for EIP that reflect the plain language of the statute as interpreted by the courts.

1. The plain language

The first step in statutory interpretation is the plain language of the statute. The term “prior express invitation or permission” (“EIP”) is clear and unambiguous. The key provision in this term is the requirement that permission or invitation must be “express.” Black’s Law Dictionary defines “express” as:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with “implied.”

For permission or invitation to be “express” all the elements which are being consented to or invited must be clearly, directly, and explicitly consented to. That is, the fact that the subsequent contacts “will contain advertising, and that they will be sent via fax” must be crystal clear. Merely telling a vendor to “stay in touch” does not “expressly” consent to *either* advertisements or faxes.

2. The courts have made consistent interpretation of these term

The appropriateness of this construction has been adopted by a number of courts hearing TCPA cases:

For consent to send fax advertisements to be valid according to 47 U.S.C. § 227(b)(1)(c), the recipient must be expressly told that the materials to be sent are advertising materials, and will be sent by fax. In the absence of each clear prior

⁴⁷ Of course, an organization that wanted to promote such fax advertisements between members can easily include a standard provision on its membership form to expressly grant permission to other members to send fax advertisements.

notice, express invitation or permission to send fax advertisements is not obtained.⁴⁸

This recognizes a congressional policy choice, that for permission or invitation to be valid, Congress required that it must be “express.” While junk faxers may complain it is harsh to require express consent, that is what Congress commanded. It has been long established that harshness is no justification to alter the interpretation of the law. “If the true construction has been followed with harsh consequences, it cannot influence the courts in administering the law. The responsibility for the justice or wisdom of legislation rests with the Congress.”⁴⁹

3. Burden of proof for EIP

As discusses *supra*, the burden on an advertiser seeking to avail itself of an exception or exemption bears the burden of proof.⁵⁰ The same principle applies to place the burden of proof for EIP on the advertiser.

4. Form of proof for EIP or EBR

The form of the documentation that an advertiser maintains to meet its burden of proof that EIP was obtained or an EBR existed, should in the first instance be left up to the advertiser. Some advertisers may wish to maintain a signed waiver. Others may merely keep written notations or logs. Others may rely on other evidence, or even no evidence at all and simply rely on its internal policies

⁴⁸ *Jemiola v. XYZ Corp.*, 802 N.E.2d 745, 748, 126 Ohio Misc.2d 68, 2003 TCPA Rep 1252 (Ohio C.P. Dec. 11, 2003). *See also* *Altman v. Inside Edge, Inc.*, 2004 TCPA Rep. 1291 (Mo. Cir. Aug. 2, 2004); *Antollino v. Lasalle Svcs., Inc.*, 2004 TCPA Rep. 1335 (N.Y. Sup. May 12, 2004); *Bogot v. Olympic Funding Chicago, Inc.*, 2003 TCPA Rep. 1267 (Dec. 10, 2003); *Clark v. Red Rose, Inc.*, 2004 TCPA Rep. 1300, 2004 WL 1146679 (Oh. Mun. May 3, 2004); *Holcomb v. Sullivan Hayes Brokerage Corp.*, 2002 TCPA Rep. 1078 (Colo. Dist. Feb. 25, 2002); *Schumacher Fin. Svcs., Inc. v. Metropark Comm.*, 2003 TCPA Rep. 1093 (Mo. Cir. Feb. 14, 2003); *Schumacher Fin. Svcs., Inc. v. Nat'l Fed'n of Ind. Bus.*, 2003 TCPA Rep. 1088 (Mo. Cir. July 3, 2003); *Travel Travel Kirkwood, Inc. v. Jen N.Y. Inc., dba Discount Tickets*, 2005 TCPA Rep 1410 (Mo. Cir. Nov. 4, 2005).

⁴⁹ *United States v. First Nat'l Bank of Detroit*, 234 U.S. 245, 260 (1914).

⁵⁰ *See* note 21 *supra* and accompanying text.

and procedures to ensure compliance. Since the advertiser will be held liable for failures to obtain EIP and it bears the burden of proof that EIP was obtained, it is reasonable to leave up to the individual advertiser what type of evidence it desires to keep to prove that it actually obtained EIP to send any particular fax.

R. Require identification of the advertiser and the fax broadcaster.

The Commission has adopted different positions at different times with regard to identification of the advertiser and the advertiser's agent, often called the "fax broadcaster" on facsimile advertisements. However, the decision not to require a broadcaster's identification on faxes sent on behalf of their client was based on misleading descriptions of the fax broadcasting industry, and has proven in practice to be a failure from the perspective of the consumer. The mistake has been the belief that fax broadcasters function in a role like a common carrier – merely accepting the communication from their client and transmitting it.

This unfortunately is not reality. Most recently the Commission noted that when a fax broadcaster was "highly involved" such as providing the list of fax numbers or preparing content for the fax, then the broadcaster's identification must appear along with the advertiser's.⁵¹ While in theory this would be sufficient, the reality is that the illegal fax broadcasters seek to subvert this requirement by "steering" their clients to other sources to obtain the list of fax numbers or to design the faxes. Often the "other" entity that provides the actual list of fax numbers is in the same office as the fax broadcaster, and the bill to the advertiser even reflects the two purchases (the fax list and the fax broadcasting) on the same bill. Yet these broadcasters insist they have no TCPA liability and need not be identified on the faxes.

⁵¹ *Report and Order* at ¶203.

The most abusive junk faxers know that the longer than can remain unidentified, the longer they can milk the system. Some go so far as to even prohibit their clients from revealing the identity of the fax broadcaster to a consumer who files a TCPA complaint.⁵²

Because of these unconscionable attempts to evade the identification requirements and hide from consumers, the Commission should adopt a rule that both the broadcaster and the advertiser must be identified in the same manner as the advertiser on all faxes. Any burden on a “legitimate” fax broadcaster is minimal and is greatly outweighed by the benefits to the consumer of being given complete identification of the parties involved in these faxes.⁵³

1. Hold that “steering” an advertiser to fax number lists or list providers is “highly involved.”

The Commission should also hold that where a fax broadcaster or any affiliated entity provides any “advice” to the advertiser, such as suggesting content, “steering” the advertiser to a source of fax numbers, making any representations regarding the legality of fax advertising or advising the client how to comply with fax advertising regulations, that broadcaster has a “high degree of involvement.” Sometimes a fax broadcaster’s own website will have links or instructions on how to obtain lists of fax numbers. For example, the fax broadcasting website of Faxts Telysis, Inc., <<http://www.faxbroadcasters.com/>> directs users to a source of fax number lists for sale on the website <http://www.fax-list.com/forms/faxlists_frm.htm>. However both websites are registered to Masters Enterprises, Inc. in Redmond, Washington, all sharing the same address with Faxts

⁵² For example, a broadcaster which is reported to provide lists for junk faxing to its clients, Concord Fax, LLC, has implemented such terms in at least some of its contracts. *See* “Exhibit “A” to these comments titled “Enhanced Fax Service Agreement Terms and Conditions” of Concord Fax, LLC.

⁵³ An exemption for actual *licensed* common carriers would be appropriate so that telephone company carriers who are carrying messages for others would not be subject to such a regulation, unless they are involved in fax broadcasting as opposed to mere carriage which was the basis of their license.

Telysis, Inc. It is clear that a broadcaster is involved to this point should have TCPA liability and its own identification should be on the fax.

S. Clarification of Ambiguities

Not surprisingly, there are some bad actors in the junk fax business and they prey on otherwise legitimate business people, enticing them to send junk faxes by misleading these clients that it is legal to send the faxes. Many times, these miscreants quote Commission documents in deceptive ways, taking advantage of the lack of familiarity of the average businessman with federal law and Commission regulations.

In addition, several websites and business newsletters have sprung up, that (sometimes unintentionally) give inaccurate advice about the Commission's faxing and telemarketing rules. Unfortunately, some portions of the statute and the Commission's rules are not crystal clear, and invite misinterpretation.⁵⁴ Some of the most common misinterpretations and attempted evasions found so far are listed below, and I respectfully ask the Commission to make a clear and unambiguous statement in regard to each of these issues.

1. Make clear that the mere publication of a fax number in a directory or a web site is not enough to permit faxes, that an EBR must also exist.

Because of the JFPA language regarding how a fax number can be used if it was obtained from certain directories and websites, some people believe that merely finding a number published in any directory or on a web site is sufficient to permit any fax advertising to be sent to that fax

⁵⁴ For example, in the NPRM itself, statements like the JFPA "amends section 227(b)(2) of the Act by adding language that requires senders of unsolicited facsimile advertisements to include a notice on the first page of the facsimile that informs the recipient of the ability and means to request that they not receive future unsolicited facsimile advertisements from the sender" (NPRM at ¶19) when taken out of context can be interpreted to mean *any* unsolicited fax is now permitted if it contains the opt-out notice. The Commission should pay careful attention to these statements and use more precise terms, such as "EBR-based facsimile advertisements" which is more precise in that sentence than "unsolicited facsimile advertisements."

number. The Commission should make clear that the mere publication of a fax number in a directory or a web site is not enough to permit faxes, that an EBR ***must*** also exist.

2. Make clear that including the opt-out notice is not enough to permit faxes, that an EBR must also exist.

Because of the JFPA language regarding an “opt-out” notice, some people believe that merely having that opt-out notice on a fax is sufficient to permit any fax advertising to be sent. The Commission should make clear that the mere presence of an opt-out notice is not enough to permit faxes, that an EBR ***must*** also exist.

3. Make clear that the mere existence of an EBR is not enough to permit faxes, that the fax number used must have been obtained in compliance with the rules.

Because of the JFPA created a limited exemption for EBR-based faxes, some people believe that merely having an EBR is sufficient to permit any fax advertising to be sent. The Commission should make clear that merely having an EBR is not enough.

4. Merely visiting a website does not create an EBR.

A consumer or an employee in a business can visit hundreds of websites a day. Indeed, even searching for information in a search engine may return imbedded images from unrelated websites in advertisements. This is technically a “hit” on that advertiser’s website, and shows up in the log files of that advertiser’s web site as an “inquiry” to that web server by the visitor’s IP address. Such a single website “hit” could be claimed to create an EBR so junk faxes can be sent to every fax machine in the company that visitor IP address belongs to. Unless the person visiting the website provides their name and a fax number to contact them, such a visit can not be construed to be of the nature to create an EBR.

5. *Initiating a lawsuit does not create an EBR*

While this seems silly to have to discuss, this argument has actually been raised by junk faxers. It would benefit consumers if the Commission made clear this sort of ruse is not valid.

6. *Attempting to obtain information in the process of making a TCPA complaint does not create an EBR.*

Similarly, several junk faxers have recently tried to claim that when a consumer received a junk fax and then called the company identified on the fax or sent a faxed response requesting identification, that subsequent junk faxes to that consumer were all within an EBR.⁵⁵ If this were true, even the Commission's own inquiry letters to junk faxers would create an EBR so those junk faxers could send their missives to the Commission's fax machines all over the country, completely legally. It would benefit consumers if the Commission made clear this sort of ruse is not valid.

7. *The TCPA applies to all faxes received in the U.S., regardless of whether the fax as sent interstate, intrastate, or internationally.*

Many junk faxers continue to claim that their faxes are not subject to the TCPA because their faxes are (pick one) interstate, intrastate, or international. These claims are solely intended to provide a subterfuge and discourage complaints to the Commission by consumers, as well as to illegally entice their clients into sending junk faxes. It would benefit consumers if the Commission made clear that the TCPA applies to all faxes received anywhere in the country regardless of their source or path of transmission.

T. *The Commission should consider creating regulations governing the entities engaged in providing lists of fax numbers.*

While it may be outside the scope of this NPRM, I encourage the Commission to review the

⁵⁵ *See, e.g.*, comments of Jimmy A. Sutton in this docket.

ample websites of “fax broadcasters” and “list brokers” and formulate a response to the clear harms to consumers that these services cause.

U. The Commission should recognize that for faxes sent prior to the JFPA, no EBR exemption existed and FCC dicta to the contrary is in error.

In the 2003 Report and Order, the Commission recognized that the an EBR exemption should not continue. However, the Commission denied that the EBR exemption for faxes never existed. The courts have roundly rejected the existence of an EBR exemption for faxes. Congress removed that exemption from the TCPA before passage. An administrative agency can not pencil back in what Congress explicitly took out of a statute.

By continuing to stay implementation of the Commission’s new interpretation of the TCPA, the Commission implicitly reaffirms that it adheres to its prior interpretation and that it’s prior interpretation is still the law.

The Commission should now make clear that its earlier interpretation of the TCPA creating an EBR for faxes was in error, and that in fact and in law, no such exemption exists now or ever existed for faxes transmitted before July 9, 2005.

IV. CONCLUSION

In exercising its discretion and in interpreting the TCPA and JFPA, the Commission should be mindful of the basic principal that has guided the interpretation of the law for over 400 years:

And it was resolved by them that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:-

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth.

And 4th. The true reason of the remedy; and then the office of all the Judges is

always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.⁵⁶

The “mischief” is junk faxes.

Respectively Submitted, this the 9th day of January, 2006.

_____/s/
Robert Biggerstaff

⁵⁶ *Heydon's Case*, 3 Co. Rep. 7a, 7b; 76 Eng. Rep. 637, 638 (1584), cited by *Pierson v. Ray*, 386 U.S. 547 (1967).

ENHANCED FAX SERVICE AGREEMENT TERMS AND CONDITIONS

BLOCK LIST SERVICE ADDENDUM

1. **Block List Service.** Concord Fax, LLC will provide Customer with access to a toll-free telephone number and unique identification code to include on facsimiles transmitted by Concord Fax, LLC on behalf of Customer. Recipients of Customer's facsimile transmissions can utilize this toll-free number and unique identification code to call and enter their facsimile number into Concord Fax, LLC's block list database, so that any future attempts by Customer to send a facsimile to the recipient's facsimile number using the Concord Fax, LLC broadcast fax services will be blocked and no facsimile transmission will occur to recipient.
2. **Identification of Concord Fax, LLC.** Customer agrees that it will not disclose to any third party that Concord Fax, LLC transmitted facsimiles on behalf of Customer, unless required to do so by order of Law. Customer further agrees to not provide to any third party the contact information for Concord Fax, LLC unless required to do so by order of Law.
3. **Permitted Usage.** Customer agrees that the toll-free telephone number and unique identification code provided to Customer by Concord Fax, LLC will be used solely for facsimile transmissions conducted by Concord Fax, LLC on behalf of Customer.
4. **Ownership of Blocked Numbers.** Customer agrees that all facsimile numbers collected and blocked by the Concord Fax, LLC Block List Service remain the exclusive property of Concord Fax, LLC, and will not be provided free of charge to Customer. If Customer wishes to have access to the facsimile numbers blocked by the Concord Fax, LLC Block List Service, Customer may purchase those facsimile numbers from Concord Fax, LLC for \$0.05 per facsimile number blocked by the service on behalf of Customer.
5. **Regulations Regarding Sending Facsimiles.** There are laws and regulations in Canada, the United States and other countries that regulate the sending of facsimiles. Generally, the content provider must include its name and contact information so that a recipient may contact them at no additional cost. Additionally, it is a violation of U.S. federal law to send an unsolicited advertisement to a facsimile machine where certain approvals or waivers have not been obtained. Civil or criminal penalties may exceed \$1,500 for each transmission in violation of these laws or regulations. Concord Fax, LLC expressly forbids the unlawful use of its services or of business lists which may violate any applicable law or regulation. It is solely the responsibility of the Customer to ensure that all such laws and regulations, including without limitation, regulation of unsolicited advertising, are adhered to. Customers expressly absolve Concord Fax, LLC of all responsibility for their use of Concord Fax, LLC services and warrant that they are in full compliance with all laws and regulations regarding sending facsimiles. Concord Fax, LLC strongly recommends that Customers seek legal advice to ensure they are in compliance with all such laws and regulations, prior to use of Concord Fax, LLC services.
6. **Waiver of Liability.** As a material inducement for Concord Fax, LLC to provide the services hereunder, Customer agrees that under no circumstances, including negligence, shall Concord Fax, LLC or anyone else involved in creating, producing or distributing the Concord Fax, LLC services, be liable for any direct indirect incidental, special or consequential damages that result from: 1) the use of or inability to use, Concord Fax, LLC services including the block list services; 2) from mistakes, omissions, interruptions, deletion of files, errors, defects, delays in operation or transmission; 3) any failure of performance; 4) claims based on violations of any law or regulation due to use of Concord Fax, LLC services.
7. **Disclaimer of Warranties.** Concord Fax, LLC makes no express or implied warranties to Customer as to the description, quality, merchantability, completeness or fitness for any purpose of the goods or services provided. Concord Fax, LLC expressly disclaims all warranties, expressed or implied, including but not limited to, warranties of merchantability and of fitness for a particular purpose.
8. **Indemnification.** Customer shall defend, indemnify and hold harmless Concord Fax, LLC, its officers, directors, employees and agents from any claims and expenses, including reasonable attorney's fees, related to any breach of this agreement, use of Customer's account, or in connection with the placement or transmission of any message, information, software or other content using the service. Concord Fax, LLC shall give written notice of any such claim, action or demand within a reasonable time. Concord Fax, LLC shall be represented by attorneys of its choice at Customer's expense. The foregoing also shall include reasonable cost of collections, including legal fees.
9. **Governing Law & Venue.** This agreement shall be governed by and construed in accordance with the laws of the State of Washington. The parties stipulate to the exclusive jurisdiction of the federal and state courts located in Seattle Washington to hear any controversy or claim between the parties arising out of or related to this agreement. The parties also stipulate to personal jurisdiction in such courts and expressly agree not to contest venue or jurisdiction in such courts.
10. **Severability.** If any provision or portion of this agreement shall be held invalid under any applicable laws, such invalidity shall not affect any other provision of this agreement that can be given effect without the invalid provision or portion, and, to this end, the provisions or portions hereof are severable.
11. **Termination.** Customer may cancel the services at anytime. Customer's only remedy with respect to any dissatisfaction with any term, rule, policy or practice of Concord Fax, LLC is to terminate this agreement by delivering notice to Concord Fax, LLC. Concord Fax, LLC reserves the right to suspend or terminate the services provided to Customer, at its sole discretion, for any reason or for no reason at all. The parties agree that Concord Fax, LLC will not be liable for any damages suffered by Customer due to Concord Fax, LLC suspension or termination of services under this agreement.

R e d a c t e d

Company Name

Customer Name (Printed)

Customer Signature

Date